

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

WFND, LLC,)
)
)
 Plaintiff/Appellant,)
 and Cross-Appellee,)
)
 vs.)
)
 Fargo Marc, LLC,)
)
)
 Defendant/Appellee,)
 and Cross-Appellant.)
)

Supreme Court No. 20060125

Appeal from the Judgment, Dated April 18, 2006, Civil No. 09-04-C-03626
Cass County District Court, East Central Judicial District
The Honorable Douglas R. Herman

BRIEF OF APPELLANT

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I. STATEMENT OF ISSUES

WFND, LLC, the Plaintiff/Appellant/Cross-Appellee, "WFND" presents these issues:

1. Did the court misinterpret and misconstrue the Purchase Agreement by finding it was not breached?
2. Did the court err by using a 9.08% capitalization rate rather than 8% to calculate WFND's damages?
3. Did the court err by applying the comparative fault statutes to a breach of contract case?
4. Did the court err by awarding the Defendant/Appellee/Cross-Appellant, Fargo Marc, LLC, "Fargo Marc" damages against WFND because of a land sale WFND made after the closing?
5. Did the court err by failing to award WFND interest and attorneys' fees?

II. STATEMENT OF THE CASE

A. Nature of the Case

This case is about the breach of a Real Estate Purchase Agreement (App. P. 174) “Purchase Agreement” between Fargo Marc, the Seller, and WFND concerning Westgate Commons Shopping Center “Westgate Commons” in West Fargo, North Dakota. WFND elected to prove and recover damages for breach of contract only. This is not a personal injury, negligence, tort, or products liability case. Comparative fault is not in issue.

B. Course of Proceedings

The Amended Complaint (App. P. 7) alleged that because Fargo Marc misrepresented the rent Gap, Inc., aka, Old Navy Inc., “Old Navy” owed under its lease at Westgate Commons, Fargo Marc breached the Purchase Agreement. (Tr. 44, App. 14). WFND alleged breach of contract but not deceit.

Fargo Marc’s Answer to Amended Complaint, Counterclaim and Jury Demand (App. P. 52) alleged that WFND knew or should have known the Old Navy rent. Fargo Marc’s Answer plead no breach of contract defenses. Fargo Marc’s counterclaim sought 50% of the proceeds of a land sale WFND made after closing.

Fargo Marc withdrew its jury demand. The court trial occurred between July 25, 2005 and August 1, 2005.

C. The Disposition Below

After the court’s partial oral rulings of August 1, 2005 (App. PP. 471-492) promising it would conduct additional research on the applicability of the comparative fault statutes and the follow up August 2, 2005 email message (App. P. 470) allocating

fault for deceit, the parties submitted very detailed proposed findings resulting in those entered October 19, 2005 (App. PP. 493-516), anticipating an appeal.

The First Amendment to Real Estate Purchase Agreement “Amended Purchase Agreement” (App. P. 206) provided a \$1.5 million holdback of the purchase price, which had been reduced to \$345,633.18 by the trial. ¶32 of the findings (App. P. 499). ¶33 of the findings (App. P. 499) shows the stipulated reductions from the holdback leaving \$163,505.48.

The findings include a table showing the holdback reduced by three stipulated items, WFND’s damages of \$243,777.53 because of misrepresented Old Navy rent, reduced to \$170,644.27, after application of the comparative fault statutes, but adding 50% of the \$114,749.83 WFND obtained from a land sale to Menard, Inc., “Menards” after the closing resulting in a net judgment for Fargo Marc of \$50,236.12 (App. P. 515).

After the October 19, 2005 findings, the parties taxed their costs resulting in the court’s April 13, 2006 Order for Judgment (App. P. 517), reducing the April 18, 2006 judgment to \$38,700.12 (App. P. 519). WFND filed its Notice of Appeal on April 26, 2006 (App. P. 521).

WFND’s damages for the misrepresented Old Navy rent should be \$276,687.50 using an 8% capitalization rate rather than \$243,777.53 using the 9.08% capitalization rate applied by the court, \$276,687.50 is the proper measure of damages for Fargo Marc’s breach of the Purchase Agreement (App. P. 174), the \$276,687.50 should not be reduced by 30% because of the comparative fault statutes, WFND should have been awarded interest and attorneys’ fees, and Fargo Marc should have received nothing because of WFND’s land sale to Menard’s

Whether the court properly interpreted and construed the Purchase Agreement (App. P. 174) and applied the comparative fault statutes raises issues of statewide importance.

D. What Went Wrong and What WFND Wants

WFND elected to pursue only breach of contract. The court, disregarding the main object and purpose of the contract, found deceit, misrepresentation and “fundamental forgetfulness”, but no breach. It applied the comparative fault statutes reducing damages, already improperly calculated, using a capitalization rate not in the evidence. It promised to rule on interest, but did not. It failed to award attorneys’ fees under the contract. It awarded Fargo Marc a share of land sale proceeds contrary to the contract, evidence and other law.

WFND seeks breach of contract damages measured using the only capitalization rate in evidence, without reduction for the comparative fault statutes, interest and attorneys’ fees, without reduction because of the land sale.

III. APPLICABLE STANDARDS OF REVIEW

Findings of fact are subject to the “clearly erroneous” standard of review, while conclusions of law are fully reviewable. *Fladeland v. Gudbranson*, 2004 ND 118, ¶7, 681 N.W.2d 431. A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if no evidence exists to support the finding, or if, on the entire record, the appellate court is left with a definite and firm conviction a mistake has been made. *Id.*

An abuse-of-discretion occurs when the court acts in an arbitrary, unreasonable or unconscionable manner or when it misinterprets or misapplies the law. *BeauLac v. BeauLac*, 2002 ND 126, ¶10, 649 N.W.2d 210. A court also abuses its discretion if its

decision is not the product of a rational mental process leading to a reasoned decision. Dixon v. McKenzie County Grazing Ass'n., 2004 ND 40, ¶29, 675 N.W.2d 414.

Questions of law are subject to de novo review. Fish v. Doctor, 2003 ND 185, ¶7, 671 N.W.2d 819. The interpretation of a statute is fully reviewable on appeal. VND, LLC v. Leever Foods, Inc., 2003 ND 198, ¶9, 672 N.W.2d 445. The interpretation of a contract is a question of law, and thus fully reviewable on appeal. See Fortis Benefits Insurance Company v. Hauer, 2001 ND 186, ¶11, 636 N.W.2d 200. The construction of a written contract to determine its legal affect is a question of law for the court to decide and on appeal the North Dakota Supreme Court must independently examine and construe the contract to determine if the court erred in its interpretation. Ag Acceptance Corp. v. Glinz, 2004 ND 154, ¶12, 684 N.W.2d 632.

Rule 52(a) N.D.R.Civ.P., requires the court to make findings of fact when a case has been tried without a jury.

Where the trial court ruled on a issue, but failed to make any findings, its determination was clearly erroneous and had to be set aside. Hurst v. Hurst, 295 N.W.2d 316, 323 (N.D. 1980)

If the trial court refuses to make findings of fact on all issues the aggrieved party's remedy is to appeal from the Judgment, and the review by the appellate court is de novo. See Chaffee-Miller Land Co. v. Barber, 97 N.W. 850 (N.D. 1903).

The amount of damages to which a party is entitled is a question of fact that will not be reversed unless it is clearly erroneous and the Court will sustain an award of damages if it is within the range of the evidence presented to the trier of fact. Landers v. Biwer, 2006 ND 109, ¶¶13 & 14, 714 N.W.2d 476.

Whether a contract has been substantially performed and whether a party has breached a contract are findings of fact which will not be reversed on appeal unless they are clearly erroneous. *Wachter v. Gratech Company, LTD.*, 2000 ND 62, ¶17, 608 N.W.2d 279; and whether a party has breached a lease requires a finding of fact. *Peterson v. Frontpage, Inc.*, 462 N.W.2d 157, 158 (N.D. 1990); *Keller v. Bolding*, 2004 ND 80, ¶17, 678 N.W. 2d 578.

IV. STATEMENT OF FACTS

A. Summary and Overview

The most important document is the November 19, 2002 Purchase Agreement (App. PP. 174). The buyer is JMC Development, LLC, whose nominee or designee is WFND. Robert DiMucci and his children own WFND and he manages it (Tr. p. 8). The subject of the Purchase Agreement is Westgate Commons, located just East of Menards on 13th Avenue South. At the time of the Purchase Agreement, Westgate Commons only had five national tenants.

The focus of this appeal is not on disputed facts but on the court's improper interpretation and construction of the Purchase Agreement, (App. P. 174) where it held deceit could not amount to a breach, where it applied the comparative fault statutes to a breach of contract, where it enforced and expanded an alleged oral agreement concerning a land sale by WFND despite nonperformance of two condition precedents which even if met, would have yielded Fargo Marc only 50% of \$25,000.00. The court failed to award WFND interest or attorneys' fees.

The court's findings (App. P. 493), though detailed, make a breach of contract into a tort, causing misapplication of the comparative fault statutes.

Because the court did not properly interpret and construe the Purchase Agreement, it concluded that although Fargo Marc was guilty of deceit and was “fundamentally forgetful” there was no breach. Thus, Fargo Marc benefited by its deceit, receiving a 30% reduction in the damages caused by its deceit (15% because WFND failed to discover it was being deceived and another 15% because Old Navy, a non-party, kept paying the old rent for over a year after Fargo Marc reduced its rent). The court adopted erroneous views of the comparative fault statutes and contract law.

The interesting twist is that Fargo Marc gave Old Navy a significant rent reduction, which it did not take, until it conducted a lease audit after closing. Fargo Marc took advantage of this error, certifying the old rent. We detail the circumstances to show why the Purchase Agreement was breached, not to undermine the court’s findings of misrepresentation, deceit and “fundamental forgetfulness”.

The court’s detailed findings (App. P. 493) outline key terms of the Purchase Agreement, account for the \$1.5 million holdback, explain the Old Navy rent reduction, and contain a table in ¶44 (App. P. 501) outlining the documents required by the Purchase Agreement all showing Old Navy rent being paid at \$11.90 per square foot, except for the First Amendment to Lease “Amended Lease” (App. P. 161) allegedly mistakenly dated May 30, 2001, instead of May 30, 2002, allowing Old Navy the rent reduction, all superseded by a Tenant Estoppel Certificate (App. P. 213), a Certified Rent roll (App. P. 215) given by both Old Navy and Fargo Marc as part of the closing, and a copy of a recent rent check from Old Navy (App. P. 173).

The findings summarize the result of the directed hindsight analysis Fargo Marc used to try to show that if WFND had assumed Fargo Marc would commit deceit and that

the July 28, 2002 Old Navy rent check (App. P. 173), the January 22, 2003 Old Navy Tenant Estoppel Certificate (App. P. 213) and the January 30, 2003 Certified Rent Roll (App. P. 215) should have been ignored, a question about Old Navy's rent could have arisen.

WFND's pre-eminent expert witness, testified that nothing about the closing documents would have caused a reasonable purchaser to question the Old Navy rent.

The findings indicate that WFND could have contacted Fargo Marc to ask about the Old Navy rent. But Fargo Marc itself was not properly tracking the Old Navy rent and Fargo Marc's employee, Carrie Libman, did not know herself that Fargo Marc had reduced Old Navy's rent.

Old Navy's Tenant Estoppel Certificate (App. P. 213), and Fargo Marc's Certified Rent roll (App. P. 215), all represented and certified that Old Navy was paying rent at \$11.90 per square foot, not the reduced rate allegedly allowed by the May 30, 2001, Amended Lease (App. P. 161).

Fargo Marc asserts that since it provided all of the documents and representations required by the Purchase Agreement, it cannot have breached the Purchase Agreement, even though it knew Old Navy was mistakenly overpaying its rent and even though, as the court found, Fargo Marc committed the tort of deceit. See Finding ¶70 (App. P. 508).

Since the main object of the Purchase Agreement was to provide WFND a truthful and accurate accounting of the rent the five national tenants were legally obligated to pay, the deceit amounts to the breach. The court misinterpreted and misconstrued the Purchase Agreement by drawing the conclusion of law that since it was not breached by the deceit of Fargo Marc, WFND's damages would be reduced by 30%.

The court's findings concerning WFND's sale to Menards (App. PP. 509-515) start from a misinterpretation and misconstruction of ¶¶13.1, 19.2 and 19.15 of the Purchase Agreement (App. PP. 187, 192 and 194). ¶19.15 contains two condition precedents to be satisfied before Fargo Marc could receive anything. It needed to obtain WFND's prior written approval, and any sale had to occur before closing. Neither condition occurred and the court's improper interpretation and construction of the last sentence of ¶19.15, that it is a stand-alone sentence, ignores the words "such conveyance" which tie to the earlier sentences stating the condition precedents.

The record contains no subsequent written agreement between WFND and Fargo Marc for any land sale.

Gary Pachucki, Fargo Marc's owner/manager, alleged a subsequent oral agreement that Fargo Marc hold off selling anything to Menards, but offered no proof of consideration for this agreement.

Fargo Marc forgot about the alleged gratuitous subsequent oral agreement until months after the closing, Menards contacted WFND about a sale and WFND negotiated and concluded a sale of about twice the land Fargo Marc had tried to sell.

By the closing, even if Fargo Marc could have performed the conditions precedent of the Purchase Agreement, the best sale it could have made was for \$25,000.00 (App. P. 820), making its maximum damages only 50% of that sum or \$12,500.00, instead of 50% of the \$114,749.83 WFND obtained months after the closing for more land.

Although the court found that Fargo Marc was deceitful (App. P. 508) and guilty of "fundamental forgetfulness" (Tr. P. 1250), it misapplied the comparative fault statutes

and the evidence to reduce WFND's damages at every turn. To calculate the initial damages it applied an inappropriate capitalization rate for the deceit about the Old Navy rent, ignoring WFND's uncontradicted expert testimony about the proper capitalization rate, and gave Fargo Marc an unsupportable recovery for WFND's land sale to Menards. It failed to address the \$42,886.49 interest sought by WFND (Tr. P. 1186 and App. P. 522, Item #2). The court had no reason to misapply the comparative fault statutes and the evidence to benefit a deceitful party whose manager was thoroughly impeached at trial. WFND committed no deceit. WFND was guilty of no "fundamental forgetfulness". WFND breached no contract. WFND did nothing to initiate negotiations with Menards. WFND was not impeached at trial. Only WFND presented credible and helpful expert testimony on proximate cause, proper capitalization rates and damages. Fargo Marc's expert addressed none of these things. His testimony only described a purposeful and directed hindsight analysis to try to find inconsistencies and in the documents Fargo Marc gave WFND. He had no actual experience with the purchase and sale of shopping centers. He offered no testimony of appropriate capitalization rates. He did nothing to dispute WFND's theory of damages. He only attempted to show why WFND should not have been fooled by the deceit and "fundamental forgetfulness" of Fargo Marc.

The court correctly held that the construction of written contract to determine its legal effect is a question of law (App. P. 513). If the Purchase Agreement is properly interpreted and construed, it is breached by Fargo Marc's deceit eliminating the 30% reduction of WFND's damages of \$243,777.53. If the only capitalization rate in evidence is applied, the damages will be \$276,687.00. Proper interpretation and construction of the contract will eliminate any recovery by Fargo Marc for the Menards sale.

Under these circumstances, WFND will be the prevailing party and entitled to an award of attorneys' fees allowed by ¶19.3 of the Purchase Agreement (App. P. 192) itself.

B. Trial Testimony

1. General

Mr. DiMucci's wife's family is from the Hunter, North Dakota area (Tr. P. 8). A broker contacted Mr. DiMucci knowing that Mr. DiMucci wanted to make a bond-type investment (Tr. PP. 8 and 11). Mr. DiMucci has no intent to re-sell Westgate Commons (Tr. P. 12). He was impressed by the new construction (Tr. P. 12), and its national tenants (Tr. P. 13).

Mr. DiMucci obtained a prospectus or offering circular (Tr. P. 15), Exhibit 60 (App. PP. 283-321) and it was among the first documents Mr. DiMucci reviewed (Tr. PP. 18 and 19).

To keep things focused and simple, WFND chose not to pursue all counts of the Amended Complaint.

Mr. DiMucci made his first trip to Westgate Commons in August or September of 2002 (Tr. P. 22). He drove around and visited with store managers (Tr. PP. 22-24), but testified that big tenants will not take calls from potential buyers and answer questions about lease terms and conditions (Tr. P. 30). The seller gets that information from the tenant and gives it to the buyer in the form of a Tenant Estoppel Certificate which provides the basic lease terms and rent (Tr. P. 30). All Mr. DiMucci wanted was "just honest facts presented to me so that I could make an evaluation of how much I wanted to pay for the center" (Tr. P. 34). He explained that the Purchase Agreement was meant to

provide all the facts to Mr. DiMucci that “he [needed] to make a good decision” (Tr. P. 34).

WFND purchased Westgate Commons for \$12,700,000.00. The prospectus contained an investment summary showing total annual base rent of \$1,153,216.25 (App. P. 285), which yields a 9.08% return of invested money (Tr. P. 36).

This 9.08% derived capitalization rate was used in the Amended Purchase Agreement to calculate the reduction in the purchase price if Fargo Marc placed additional unspecified future tenants in Westgate Commons paying rent less than \$14 per square foot (§14.1 on P. 2, App. P. 207 and Tr. PP. 40-42). Fargo Marc was still completing construction of Westgate Commons.

The Amended Purchase Agreement extended the inspection period because of a street problem and access problem not rent issues (Tr. P. 38). It increased the holdback to \$1,500,000.00 (Tr. P. 39). The court used the 9.08% rate to calculate the damages because of reduced rent Old Navy began paying after its lease audit. The reduced Old Navy rent of \$22,135.00 per year, divided by 9.08% yields damages of \$243,777.53 (App. P. 507), the sum the court reduced because of the comparative fault of WFND and Old Navy.

Mr. DiMucci made the purchase decision based on his personal review of the Purchase Agreement and the documents supplied to perform the Purchase Agreement (Tr. PP. 45 and 46). Mr. DiMucci dealt with Gary Pachucki from IBT (Tr. P. 44), the predecessor to Fargo Marc (Tr. P. 16). Mr. DiMucci viewed Old Navy as the anchor tenant (Tr. P. 55).

Mr. DiMucci required an Old Navy rent check, to verify the rent (Tr. PP. 58 and 59 and App. P. 173).

On the January 31, 2003 closing (Tr. P. 63), Mr. DiMucci had no inkling that any of the rents had been reduced (Tr. P. 66). He would not have closed if he had disbelieved or distrusted any of the information or documents supplied by IBT (Tr. P. 70).

2. Misrepresented Old Navy Rent

The problem with the Old Navy rent arose when Old Navy did a lease audit six or seven months after the closing (Tr. PP. 71-72). The first Old Navy Lease was dated February 16, 2001 (App. PP. 65-154). The First Amendment to Lease "Amended Lease", provides a rent reduction from \$11.90 per square foot to \$10.90 per square foot (Tr. P. 78). Old Navy did not take the reduction until after the audit. Mr. DiMucci testified that the rent was misrepresented and the contract significantly breached because the overstated rent amounted to approximately \$22,000.00 a year (Tr. P. 81). This breach "depleted my value in the property" (Tr. P. 84) and amounted to a significant breach by Fargo Marc (Tr. P. 81).

Mr. DiMucci saw all of the documents concerning rent identified in the court's table in the findings (App. P. 501) except for the May 29, 2002 letter from Gary Pachucki to Old Navy concerning the \$1 per square foot reduction (Tr. P. 92). All of the information available to Mr. DiMucci showed Old Navy rent of \$11.90 per square foot except for the Amended Lease dated May 30, 2001, later said to have a typographical error. Coming after the Amended Lease with its May 30, 2001 date came eight other documents identified in the table, not the least of which was the July 25, 2002 Old Navy rent check all showing \$11.90 per square foot rent.

The table is the key to understanding why Fargo Marc breached the Purchase Agreement's specific terms and main object and again by its deceit, by failing to disclose the Old Navy rent reduction and taking advantage of Old Navy's mistake in not taking the rent reduction until after its lease audit.

In the table the documents referred to by exhibit number match up with the Appendix as follows:

| <u>Exhibit Numbers</u> | <u>Appendix Pages</u> |
|------------------------|--------------------------------|
| 1 | 65-154 |
| 2 | 155-160 |
| 5 | 161 and 162 |
| 8 | 163-170 |
| 11 | 171 and 172 |
| 12 | not reproduced in the Appendix |
| 13 | 173 |
| 60 | 283-320 |
| 17 (Exhibit B) | 202 |
| 34 and 35 | 211-214 |
| 38 | 215 and 216 |

Even if the Amended Lease (App. PP. 161 and 162) had been dated May 30, 2002, the last five items of the table (App. P. 501) would still have superceded it, including the July 25, 2002 Old Navy's rent check and Tenant Estoppel Certificate supplied by Fargo Marc, and representing that "the monthly fixed minimum rent under the Lease is currently \$21,950.24" (App. P. 211), as well as the Certified Rent Roll signed by Mr. Pachucki on January 30, 2003, the day before the closing (App. PP. 215 and 216). There, Mr. Pachucki certified that the [attached] Rent Roll was "to the best of [his] knowledge, true and correct as of the date hereof". The attached Rent Roll represents that the Old Navy "monthly rent" was \$21,950.54 (App. P. 216), which works out to \$11.90 per square foot.

Fargo Marc's argument was: "We gave you the Certified Rent Roll the Purchase Agreement required, and even though we had reduced the Old Navy rent by \$22,135.00 a year, Old Navy never took the reduction, and was, in fact, still paying rent at \$11.90 per square foot, and therefore, we may be guilty of deceit, but we have surely not breached the Purchase Agreement even if the main object of the Purchase Agreement was to make sure the actual rent was accurately and completely disclosed". The deceitful misrepresentation of the rent breached the main object of the Purchase Agreement. The deceit equals another breach, not, as the court determined, the deceit eliminates the breach.

Without knowledge of the typographical error in the Amended Lease (App. PP. 161 and 162), the Old Navy Term Commencement and Expiration Agreement (App. PP. 171 and 172), signed by both Mr. Pachucki and Old Navy, would be dispositive. It states that it was "intended to clarify and amend the Lease."

Confirming this all was the Old Navy check Mr. DiMucci insisted on to verify the rent (App. P. 173), the unmistakable Tenant Estoppel Certificate (App. PP. 211 and 212) and the Certified Rent Roll (App. PP. 215 and 216), both coming within ten days of closing. It was impossible for the court not to conclude there was deceit.

On cross-examination, when Fargo Marc started its "due diligence" inquiry with Mr. DiMucci, WFND objected saying that the concept was legally irrelevant because WFND had, in order to simplify issues, and keep the issues within the existing pleadings, chosen just to present a breach of contract case (Tr. PP. 103 and 104). Noting the objection, the court again ruled that it would allow different theories to go forward (Tr. P. 104).

To answer the irrelevant due diligence inquiry, Mr. DiMucci testified that he compared the actual leases with the rent rolls supplied to him (Tr. P. 117). WFND even tried to contact Old Navy to obtain financial information to no avail (Tr. P. 121). Mr. DiMucci visited with his attorney who also reviewed all of the documents (Tr. P. 127). Mr. DiMucci testified that his opinion about Old Navy's contractual rent obligation was not just his conclusion but the lender's opinion, the lender's attorney's opinion, the Title Company's opinion and everybody's (Tr. P. 132). Fargo Marc's employee, Carrie Libman, was still reporting Old Navy rent of \$21,950.54 in a January 23, 2003 email (App. P. 274) and the appraisal required by WFND's lender assumed Old Navy rent at \$11.90 per square foot (App. P. 393).

Mr. DiMucci identified some of the breaches of the Purchase Agreement (Tr. PP. 166-168), highlighting Fargo Marc's misrepresented Old Navy rent (Tr. P. 181), and testified he understood a rent roll is to reflect what a tenant is actually supposed to be paying (Tr. PP. 182 and 184). Mr. DiMucci summarized Fargo Marc's conduct as deceitful and not being forthright and honest (Tr. P. 183). Mr. DiMucci concluded, as did the court, that Mr. Pachucki knew the rent Old Navy was supposed to be paying because "He's the one who requested that Old Navy change it for his benefit, and he knew he was collecting the wrong amount of rent, and he was doing that for a period of time" (Tr. P. 184). Mr. DiMucci had no idea that Fargo Marc was collecting too much rent from Old Navy (Tr. P. 225), and he had known WFND would have paid less (Tr. P. 234).

Mr. DiMucci believed Old Navy was legally obligated to pay rent of \$11.90 per square foot and that in the business of shopping center development and sales, it is standard practice, when it comes to relying on rent representations, to rely on Tenant

Estoppel Certificates and certified rent rolls, not phone calls and going through people's offices to rifle through files to try to figure out for oneself what the rent might be (Tr. PP. 238 and 239). WFND would not have purchased Westgate Commons without the Tenant Estoppel Certificate from Old Navy dated January 22, 2003 and the Certified Rent Roll from Fargo Marc dated January 30, 2003 (Tr. P. 244 and App. PP. 211 and 212 and 215 and 216). As Mr. DiMucci testified, the seller has all of the information and tenants will not disclose rent information to a potential buyer (Tr. P. 248).

At the beginning of the second day of trial, the court was still undecided about whether the case should be analyzed "in contract or under the tort of deceit ..." (Tr. P. 256).

Mr. DiMucci concluded his testimony by again characterizing Old Navy as Westgate Commons' anchor tenant, stating that he had never personally experienced a closing to find that a tenant later discovered it was over-paying the rent, nor had he ever heard of this problem with national tenants (Tr. PP. 266 and 267).

Mr. James Kirby was WFND's expert witness. His resume (App. P. 440) background, knowledge, training and experience must be read to be believed (Tr. PP. 288-307). Mr. Kirby has been involved with some of the wealthiest developers, families and landowners concerning some of the biggest projects in the world.

Mr. Kirby served as a consultant with Hopkins & Sutter, the prime legal contractor to the Resolution Trust Corporation "RTC" (Tr. P. 301). The RTC was formed to receive failed Savings & Loans and Mr. Kirby consulted with Hopkins & Sutter to review RTC files to look for possible wrongdoing or possible misappropriation of

funds (Tr. P. 301). The goal was to decipher what had happened to see if the lender had undertaken proper due diligence (Tr. P. 302).

Mr. DiMucci hired Mr. Kirby to review Mr. DiMucci's decision to purchase Westgate Commons and, in particular, to look at Mr. DiMucci's file "and tell him if he had done his job properly or not" (Tr. P. 308).

Mr. DiMucci just generally told Mr. Kirby that he had a problem with a shopping center and wanted Mr. Kirby to look at the file because Mr. DiMucci "didn't want to spend money on a lawsuit if he was wrong" (Tr. P. 310).

Mr. Kirby testified that he knew Westgate Commons was still under construction at the time of the purchase (Tr. P. 313), and that Westgate Commons' tenants were national tenants (Tr. P. 314). He testified that the due diligence required to purchase Westgate Commons would be at the lowest level because of new construction, lack of zoning issues, the presence of national tenants, five-year leases, etc. (Tr. P. 314). Mr. Kirby testified that he had never seen a situation where a national tenant received a rent reduction but continued to pay the old rent for many months (Tr. P. 314).

Mr. Kirby prepared Exhibits 64 and 65 (App. PP. 443 and 444) to show what documents had been provided by Fargo Marc to Mr. DiMucci (App. PP. 443 and 444). Exhibit 64 assumed that the Amended Lease did not contain a typographical error and was, in fact, dated May 30, 2001. Exhibit 65 assumed that the Amended Lease was actually dated May 30, 2002. Either way, Mr. Kirby concluded that Mr. DiMucci did reasonable due diligence (Tr. P. 325) regardless of the alleged typographical error or actual date of the Amended Lease (Tr. P. 326). Mr. Kirby, like Mr. DiMucci, testified that a Certified Rent Roll certifies the rent a tenant is actually obligated to pay (Tr. P.

330). Mr. Kirby testified that a developer [such as Fargo Marc] might forget "... everything, except the concessions extracted from them by important tenants." "You would not forget it" (Tr. P. 337).

The other important aspect of Mr. Kirby's testimony was the proper measure of damages for the misrepresented rent. He testified that using the 9.08% capitalization rate derived from Westgate Commons' net income divided by the \$12.7 million purchase price was not the appropriate measure of damages for reduced Old Navy rent which should be determined using an 8% capitalization rate (Tr. P. 364). Mr. Kirby's Exhibit 67 (App. P. 446), supported this conclusion. Mr. Kirby's Exhibit 66 (App. P. 445), demonstrates the counter intuitive notion that the lower the capitalization rate, the higher the damages for reduced income. Mr. Kirby concluded that applying the more appropriate 8% capitalization rate to the reduced Old Navy rent produces a reduction in value of Westgate Commons (damages) of \$276,687.00 as opposed to the roughly \$246,000.00 using the derived capitalization rate of 9.08% (Tr. PP. 368 and 369).

The court awarded damages of only \$243,077.53 (App. P. 507). \$22,135.00 divided by .08% yields \$276,687.50, the appropriate measure of damages, in Mr. Kirby's opinion (Tr. P. 369). Even if the comparative fault statutes applied to a breach of contract, any percentage fault reduction should be subtracted from \$276,687.50, not \$243,777.53.

Mr. Kirby testified that there was no indication of trouble in the documents or the information (Tr. P. 457), and that the parties acted on Old Navy rent of \$11.90 per square foot and that was in keeping with the representations of the rent made by the seller [Fargo Marc] and Old Navy itself (Tr. P. 458). Mr. Kirby testified that he would have expected

to see a Certified Rent Roll stating the rent the tenant was obligated to pay under the Lease and would have expected to see a closing statement credit for any overpaid rent that might come back to the new owner (Tr. P. 464). He testified that there should have been some disclosure of the overpaid Old Navy rent and that the closing statement (App. P. 217) should account for any overpaid rent (Tr. P. 464) but there was no rent adjustment (Tr. P. 465). After Fargo Marc started to object to this unpleasant testimony, the court pointed out that it was Mr. Pachucki himself who had signed the Amended Lease, creating an obvious problem to surface later (Tr. P. 466).

Mr. Kirby concluded that a developer would not forget a rent reduction (Tr. P. 468), and that Mr. DiMucci could reasonably rely on the rent representations in the rent roll (Tr. P. 471).

Mr. Pachucki began his testimony by admitting that the rent reduction taken by Old Navy after it discovered its rent overpayment should be credited to WFND, but only to the extent Old Navy overpaid its rent before the closing (Tr. P. 494). This \$11,395.32 appears as the stipulated reduction from the remaining holdback in finding 33, (App. P. 499). Mr. Pachucki would not concede that WFND should be entitled to any credit for rent Old Navy overpaid after closing because the error “wasn’t caught by the purchaser” and “we should owe nothing, we’re not at fault, we made no mistake” (Tr. P. 495).

The overpaid rent first came to light after Old Navy’s lease audit and it unilaterally decided to subtract the total overpaid rent from the next monthly rent check to WFND for September, 2003. Exhibit 52, App. P. 276, shows that Old Navy paid only \$13,373.28, instead of the \$21,950.24 per month it had been paying for at least seven months after the closing.

Mr. Pachucki started as an architect (Tr. P. 615), but had developed six to eight shopping centers in the last five years (Tr. P. 503), always making sure that he created a separate LLC for each one (Tr. P. 504). After being reminded of his deposition testimony, he admitted that he had never bought a shopping center that had already been built (Tr. P. 600). He admitted that a Tenant Estoppel Certificate, if one is trying to sell a shopping center, is to give the buyer some assurance from the tenant that the tenant actually acknowledges the rent that it is paying under the lease (Tr. P. 508). He admitted that a buyer is very unlikely to be able to call up tenants to actually get rent information (Tr. P. 509). He tried to explain away the Certified Rent Roll (App. PP. 215 and 216) saying that he probably had not prepared it and probably had not reviewed it in detail before closing (Tr. P. 509), because:

When you are going through a closing...[Y]ou don't have the time ...to go through every document, read every document, read every line.

(Tr. P. 510).

The third day of the trial again featured Mr. Pachucki. The night's rest did not take away his careless attitude about the Purchase Agreement and the documents it required. He testified that he didn't individually pull out any of the closing documents and read them (Tr. P. 525). He only conceded that it was possible that he had read the Certified Rent Roll (App. PP. 215 and 216) before the closing, but he did not specifically remember reading it (Tr. PP. 525 and 532). He explained that it was just a reflection of "current rent" (Tr. P. 534), as if that were good enough. He did admit that he did not personally contact anyone from WFND to tell them that Old Navy was mistakenly

overpaying its rent or that it should be paying something less than \$11.90 per square foot (Tr. P. 536).

Part of the reason Mr. Pachucki could not keep track of the rent to be paid by the five national tenants was because Fargo Marc had no formal written procedures to track rents (Tr. P. 540). Asked what procedures, if any, Fargo Marc had in place to track whether tenants were even bothering to pay their rent at all, Mr. Pachucki testified, "We had a monthly ledger ... and if there would have been an error, hopefully you would notice it" (Tr. P. 541).

Tenant checks came to Mr. Pachucki's office to be processed by his assistant, Carrie. She deposited them and prepared some type of ledger for the "outside accounting people" (Tr. PP. 541 and 542). Mr. Pachucki recalled that he reduced Old Navy's rent because he could not find a single 25,000 square foot tenant as a co-anchor (Tr. P. 542). This testimony is important considering his later testimony that Old Navy was not an anchor tenant (Tr. P. 699).

Mr. Pachucki admitted that he discussed Old Navy's rent reduction with Carrie, but that he typed his own letters to Old Navy on the subject (Tr. P. 557). Although Carrie was in charge of collecting rent, Mr. Pachucki could not recall specifically telling Carrie within a month of May 30, 2002, that Old Navy would be paying a different rent (Tr. PP. 557 and 558). Fargo Marc had no late payment reports, underpayment reports, nor any reports to identify short rent checks (Tr. P. 560).

Mr. Pachucki explained that he did not know whether Carrie would have known whether the Old Navy rent checks were coming in the right amount (Tr. P. 564). So, if Mr. DiMucci had called Carrie to try to verify the Old Navy rent, she could not have

done so. Mr. Pachucki did admit that he should have caught the error (Tr. P. 564), and that he had personally negotiated Old Navy's rent reduction (Tr. P. 565). He claims this was a mistake on his part (Tr. P. 566). Fargo Marc failed to plead mistake in its answer (App. PP. 52-61), something WFND specifically told the court (Tr. PP. 640-641).

As the day wore on, Mr. Pachucki admitted he knew at the closing that he had entered into the Amended Lease with Old Navy [providing the rent reduction] (Tr. P. 594). He explained that, "everybody knew" or "so did everybody else" (Tr. P. 594).

WFND impeached Mr. Pachucki several times. He testified that he did not have any problems with another shopping center he developed in Lincolnwood, Illinois (Tr. PP. 747 and 748). He did not recall any parking problems that came up after the sale of Lincolnwood (Tr. P. 750).

The next day Mr. Pachucki testified that Bobby Miller had not helped him sell a shopping center in Lincolnwood [IL], (Tr. PP. 805-806). He confirmed that he had experienced no problems at the Lincolnwood Shopping Center, specifically not anything to do with parking (Tr. P. 806).

Mr. Pachucki did have zoning problems (Tr. P. 812) and parking problems (Tr. P. 813) at the Lincolnwood Shopping Center, confirmed by the April 4, 2003 letter, (App. PP. 467 and 468), and Mr. Pachucki had entered into a Listing Agreement with Mr. Miller (Tr. P. 807 and App. PP. 464 and 465). Mr. Miller's commission was \$75,000 (App. P. 466). After this, Mr. Pachucki could not even remember how many shopping centers he was developing during the spring of 2003 (Tr. P. 814).

Mr. Pachucki did testify that capitalization rates in the last two years have gone down and that an 8% cap rate "would be more reflective of the market today, actually"

(Tr. P. 705). This is the same capitalization rate Mr. Kirby testified should be applied to calculate the damages for the misrepresented Old Navy rent. So Mr. Kirby, WFND's expert, and Mr. Pachucki both agreed to an 8% capitalization rate. Fargo Marc presented no contrary testimony. Still, the court applied a 9.08% rate rather than an 8% rate said to be "more reflective of the market today" by Mr. Pachucki (Tr. P. 705).

Fargo Marc presented its counter-claim by recalling Mr. Pachucki to testify about the Menards land sale. But sticking for now to the breach of contract claim because of the misrepresented Old Navy rent, it is better to skip ahead and mention that the only other Old Navy testimony presented by Fargo Marc came from Alton Nitschke who gave a tedious analysis of the reasons why the closing documents were supposedly inconsistent about the Old Navy rent, assuming that WFND would disbelieve its own eyes and ignore the Old Navy current rent check (App. P. 173), the Tenant Estoppel Certificate Old Navy gave ten days before the closing (App. PP. 213 and 214), and the Certified Rent Roll Fargo Marc gave the day before the closing (App. PP. 215 and 216). This Byzantine minutiae, viewed using directed, purposeful hindsight and assuming that Fargo Marc's representations, and those of Old Navy could not be believed, was irrelevant. Fargo Marc breached the Purchase Agreement because its main object, true disclosure of the actual contractual tenant rent obligations, was frustrated.

Mr. Kirby testified that when he was doing forensic due diligence for the RTC, he would look at something that went bad to try to determine exactly what happened (Tr. P. 322). He likened this to an aviation crash investigation and noted that in almost every fatal crash in aviation, the cause of the crash was determined. But this does not necessarily mean that any particular person was at fault (Tr. P. 322). But if you can look

backwards, and dissect something in a forensic sense, you can always find things that maybe would have caught your attention, but in the case of the documents reviewed by Mr. DiMucci, there was nothing to tip him off about a problem with the Old Navy rent, given the information he had available to him (Tr. PP. 322 and 323). As Mr. DiMucci testified, if you don't trust the seller, you don't do the deal (Tr. P. 70).

So Mr. Nitschke's testimony, even if there were a proper foundation for it, missed the mark. Mr. Nitschke offered no testimony about damages.

Mr. Nitschke has never been asked by a client buying commercial property, to review the lease obligations to find out what those obligations really were (Tr. P. 1072). He never brought his engagement letter to either his deposition or the trial (Tr. P. 1072), and could not indicate what it said (Tr. P. 1073). He knew going in that one of the issues was the Old Navy rent (Tr. P. 1077). He got confused over the terms "due diligence" and "reasonable due diligence" (Tr. PP. 1136-1139). After being reminded of his deposition testimony, he admitted that WFND pursued its purchase of Westgate Commons "... in accordance with reasonable diligence which is lower than due diligence which would be exhaustive" (Tr. P. 1140). These word games were neither helpful nor relevant. He did admit that he did not know whether WFND saw any of his "red flags" (Tr. P. 1141) later admitting that WFND did not catch the red flags (Tr. P. 1142). He admitted that, "There is no objective standard here." and, "It just depends on the subjective understanding of the individual" (Tr. P. 1145).

3. Menards Sale

The rest of the trial featured Fargo Marc's counter-claim for WFND's land sale to Menards which can be resolved by ¶19.15 (App. P. 194) in the Purchase Agreement, the

only written agreement, the testimony of Mr. DiMucci and Mr. Pachucki, and a fair interpretation of what the parties did, as opposed to what Mr. Pachucki said, to attempt to share from a sale he could not consummate, and did not assist.

¶19.15 has at least two condition precedents. WFND must give prior written approval of any sale and Fargo Marc must have completed the sale prior to closing. The last sentence of states, “Any consideration payable by Menards for such conveyance shall be shared equally between Buyer and Seller”. (Emphasis added). The court wrongly interpreted this last sentence as a stand-alone sentence, not tied to the condition precedents found in the first two sentences, despite the highlighted language. (Conclusions of Law No. 3 in the findings, App. PP. 513 and 514). Nothing in ¶19.15 addresses a post-closing sale.

Mr. Pachucki testified that discussions about the split sale proceeds occurred before the Purchase Agreement was signed (Tr. P. 849). So any agreement apart from that addressed by ¶19.15 is barred by ¶19.2 (App. P. 192).

Even so the best sale Mr. Pachucki could have arranged before the closing was for \$25,000 (Tr. PP. 862, 870 and 883). This was the only signed agreement Fargo Marc had with Menards before the closing (Tr. P. 862 and App. PP. 263-273, especially ¶VIII calling for a purchase price of \$25,000, App. P. 266). Fargo Marc performed neither of the condition precedents of ¶19.15.

Mr. Pachucki asserted that Mr. DiMucci asked him to delay the sale and that Mr. DiMucci would complete it after the closing (Tr. P. 864). Mr. Pachucki offered no testimony about any consideration for this arrangement. He did not keep in contact with Mr. DiMucci after the closing to see if a sale occurred. Someone from Menards told him

that Mr. DiMucci made a sale later (Tr. P. 876). He offered no testimony that he has even been back to Westgate Commons after the closing.

Mr. Pachucki's attorney, William Biederman, had no personal knowledge of WFND's sale to Menards and no information about whether WFND sold the same land Fargo Marc was trying to sell (Tr. P. 951). He admitted that ¶19.15 of the Purchase Agreement (App. P. 194), when read with ¶13.1 (App. P. 187), would prohibit a sale to Menards by Fargo Marc without WFND's consent (Tr. P. 956).

Mr. DiMucci testified that WFND gave no written consent to Fargo Marc to sell any property subsequent to the Purchase Agreement (Tr. P. 966), and that ¶19.15 was intended so that if a portion of the Westgate Commons' detention pond was sold to Menards before the closing, the proceeds would be split. The Purchase Agreement was not meant to provide a split from sales occurring after closing (Tr. P. 968), or those with no prior written approval (Tr. P. 969).

Not until approximately seven or eight months after the closing did Menards contact Mr. DiMucci about buying part of a detention pond (Tr. PP. 969 and 970). Menards was trying to buy only approximately 60,000 square feet. Mr. DiMucci insisted that Menards buy the entire detention pond (Tr. P. 970). In reviewing a partial site plan, Mr. DiMucci testified that the sale he made to Menards was for an area almost twice as big as the land related to the \$25,000 sale Mr. Pachucki was attempting to make (Tr. PP. 977-978), with no prior written consent, to Menards, before the closing. Mr. Pachucki did nothing to assist the sale (Tr. P. 978).

Mr. DiMucci consummated a sale to Menards for \$114,749.83. The court improperly awarded Fargo Marc 50% of that amount or \$57,374.91 (App. P. 514),

because neither condition precedent of ¶19.15 of the Purchase Agreement was performed, any sale by Mr. Pachucki would have violated ¶13.1, the agreement Mr. DiMucci eventually negotiated resulted from negotiations initiated by Menards, with no help from Mr. Pachucki, and was for a larger property.

4. Closing Arguments

On the fifth day and the court allowed closing arguments. WFND concluded that it had clearly made out a case for breach of contract and proven that the damages from the breach were the proximate cause of the breach and they were foreseeable (Tr. P. 1198).

Fargo Marc sent the court down the wrong track arguing that, "... what the Court here needs to do is look at the four corners of the contract to see what the claim[ed] breach is" (Tr. P. 1202). This broke down to an argument that since Fargo Marc supplied WFND with each of the documents required by the Purchase Agreement, whether they were deceitful or not, the contract had been performed. This narrow interpretation of breach of contract ignores the principal purpose of the Purchase Agreement - to provide WFND the actual rent the five national tenants were legally obligated to pay. Fargo Marc even argued that if WFND chose to present the case as a breach of contract case, that is fine, "But they have to – they have to not only live by the sword but die by the sword (Tr. P. 1221)." So in Fargo Marc's world, to prove a breach of contract, one must identify and isolate a specific term of a contract that has been specifically breached, without regard to the contract as a whole or its objects, even in the face of deceit. In Fargo Marc's world, there cannot be a breach of contract without due diligence, a

concept foreign to traditional contract law, and there must be a comparative fault analysis, if the breach is deceitful.

Fargo Marc might have fooled the court into taking a narrow pigeon hole, straight-jacket, line by line, four corners view of breach of contract, but it was not fooled by Mr. Pachucki's conduct. The court interpreted Fargo Marc's closing stating:

But what about the – what about the fundamental forgetfulness of Mr. Pachucki who was himself the one who negotiated this even as late as the closing and with this – it's just a two-page document. It's not even 20 or 30 words. He looks – even as late as that is testimony which, you know, I am accepting at face value – that is, he forgot. (Emphasis added)

(Tr. P. 1250). The court was referring to the Certified Rent Roll (App. P. 215).

WFND finished its rebuttal closing on Old Navy at the end of the fifth day (Tr. PP. 1258-1267) by offering an itemization of all the actual breaches of black and white terms, even setting aside frustration of the main object of the contract (accurate rent disclosure) due to Mr. Pachucki's deceit (Tr. PP. 1260-1267). The court rejected WFND's offer of a separate memorandum (Tr. P. 1268).

Monday, August 1, 2005, featured closing arguments on the Menard's sale (Tr. PP. 1275).

V. THE COURT'S RULING

Immediately after the Menards arguments the court made its oral ruling (Tr. P. 1294, App. P. 471). The court was still struggling about whether the case should be analyzed in contract, tort, or both (App. P. 471). The court expressed its preference for analyzing the case in contract and acknowledged that WFND had chosen to present the case that way (App. PP. 471 and 472). The court bought Fargo Marc's argument that

there can only be a breach of contract if a specific term taken very literally is specifically and very literally breached, without regard to the contract as a whole, its main object, implied terms, frustration of its main purpose, deceit, or anything else. The court determined that, taken as a whole, the information provided by Fargo Marc was misleading (App. PP. 476 and 477). It properly determined that the measure of damages must come from a capitalization rate applied to reduce future income (App. P. 478). But, it chose a more conservative capitalization rate of 9.08% not in evidence, rather than the 8% capitalization rate suggested by the only expert witness, the preeminent Mr. Kirby and agreed to by Mr. Pachucki.

The court also ruled that a breach of contract claim could not be sustained because the court did not think the representations and warranties in the Purchase Agreement were breached [notwithstanding Fargo Marc's deceit] and thus the \$243,000 in damages needed to be allocated (App. P. 479).

On the counter-claim, the court ruled that as a matter of fairness, the full sale proceeds would have to be split, no matter the circumstances nor when the sale occurred, not just the \$25,000 for which Fargo Marc could have sold the land (App. P. 481).

Still, the court was undecided about the big [Old Navy] issue and noted that there was a "big loose end" and that the court had to research whether comparative fault applies, and if so, then the court would need to come up with the percentages (App. P. 482). The court promised to do this research "in the next week or ten days" and to alert counsel by "a joint e-mail or fax" (App. PP. 482 and 483). WFND reminded the court that a deceit allegation never appeared in WFND's pleadings (App. P. 484). WFND explained that the deceit concept came from Fargo Marc to try to stretch the case into a

comparative fault case and WFND again stated this had never been its theory and that it had been proceeding strictly under breach of contract (App. P. 484).

The court's mind was probably already made up because the discussion about possible fault allegations, the promised follow-up research and the joint e-mail message came the next day in a one half page e-mail (App. P. 470).

WFND sought interest at the legal rate of 6% per annum or any higher rate allowed by a written lease or agreement from and after January 30, 2003 in its Amended Complaint (App. P. 14).

During closing arguments WFND presented the court with a written summary of damages it sought (App. PP. 522 and 523), going over it in detail, especially interest (Tr. PP. 1184-1186). Six percent interest on \$276,687 is \$1,383.44 per month.

The court did not discuss interest in its oral findings, its August 2, 2005 e-mail (App. P. 470), or the written findings.

The interest WFND seeks should accrue from January 31, 2003, the closing, to date, not from January 30, 2002, mistakenly stated in the written summary (App. P. 522). But, the \$42,886.49 would still be accurate, but now to August 30, 2006. Neither did the court address the other interest claims outlined in the summary (App. PP. 522 and 523).

VI. ARGUMENT

A. Fargo Marc Breached The Purchase Agreement.

The court's straight-jacketed "line by line" (App. P. 472) approach to contract breach is far too narrow, ignores implied terms, object, frustration of purpose and the duty of contracting parties to deal with each other fairly and openly. This is an extension of Fargo Marc's "four corners of the contract" (Tr. P. 1202) approach to contract breach

said to be reluctantly followed by the court (App. P. 476). This approach is too literal and leads to the odd result that because the Certified Rent Roll required by the Purchase Agreement was actually delivered, whether deceitful or not, there is no breach. The court thought that the contract could be “met” if documents required by the Purchase Agreement were simply delivered, even though they were misleading (App. PP. 476 and 477). Although WFND tried to simplify the case by sticking to breach of contract, the court’s own preference (App. P. 471), and what the court would have done itself (App. P. 487); nothing prevented WFND from pleading alternative theories or remedies. N.D.R.Civ.P. 8(a) and Butz v. Werner, 438 N.W.2d 509 (N.D. 1989). WFND prevented the case from being much more complex and confusing than necessary by refusing to try the case on mixed principals of tort law and contract law, a problem discussed in Dakota Grain Co. v. Ehrmantrout, 502 N.W. 2d 234 (N.D. 1993) and prevented WFND from stepping into the trap befalling the plaintiff in Case Credit Corporation v. Oppegards, Inc., 2005 ND 141, 701 N.W.2d 891, when it elected not to pursue remedies under the Uniform Commercial Code, choosing instead to pursue with a tort action for conversion, thus subjecting itself to the comparative fault statutes. Fargo Marc mentioned this case at the beginning of the second day of the trial, noting that it was a “commercial case in which the comparative fault law was applied” (Tr. PP. 258 and 259), never mentioning the tactical error the plaintiff made by electing a tort remedy.

The elements of a prima facie case for breach of contract are (1) the existence of a contract; (2) breach of the contract; and (3) damages which flow from the breach. United States v. Basin Elec. Power Co-op, 248 F. 3d, 781, 810 (8th Cir. 2001) (applying North

Dakota law), citing Moorhead Const. Co. v. City of Grand Forks, 508 F. 2d, 1008, 1015 n. 10 (8th Cir. 1975).

In Independence v. Lead Mines Company v. Hecla Mining Company, 37 P.3d 409, 415 (Idaho 2006), the court held that a breach of contract is non-performance of any contractual duty of immediate performance. It is a failure, without legal excuse, to perform any promise which forms the whole or part of a contract. *Id.* A substantial or material breach of contract is one which touches the fundamental purpose of the contract and defeats the object of the parties in entering into the contract. *Id.* In Miller v. Mills Construction, Inc., 352 F. 3d 1166, 1172 (8th Cir. 2003), the court held that, under South Dakota law, a breach of contract is one that would defeat the very object of the contract. Mountain Restaurant Corporation v. Parkcenter Mall Associates, 833 P.2d 119, 123 (Idaho 1992) holds that a material breach of contract is a breach so substantial and fundamental that it defeats the object of the parties in entering into the contract.

This Court has held that California decisions, while not binding, are entitled to respectful consideration and may be persuasive, and should not be ignored. Beaudion v. South Texas Blood & Tissue Center, 2004 ND 49, ¶13, 676 N.W.2d 103.

The court cited, but ignored, a remarkably similar California case, Linden Partners v. Wilshire Linden Associates, 73 Cal.Rptr.2d 708 (Cal. App. 1998), (App. P. 472). In Linden, supra, the defendant seller contracted to sell an office building to the plaintiff buyer. The building had only one sub-tenant. Pursuant to the sales agreement, the seller agreed to supply an estoppel certificate to be signed by the tenant to reflect the terms of the tenant's lease. The tenant refused to do so and the seller itself put an estoppel certificate into escrow. After the escrow closed, the purchaser discovered that

the actual rent the tenant was paying was only approximately \$6,100 as opposed to the \$9,300 stated in the estoppel certificate. The plaintiff commenced an action alleging intentional and negligent misrepresentation, breach of contract and money had and received. The jury found for the seller on the fraud and money claims and for the buyer on the claim of breach of contract. The appeals court affirmed the judgment finding that the seller owed the buyer a duty to be accurate in disclosing the tenant's rent. The court held that one to whom a representation is made has no duty to employ means of knowledge which are open to that party and which could, if pursued, reveal the falsity of the representation and that any non-performance of a duty under a contract when performance is due is a breach, including defective performance as well as the absence of performance. The court ruled that defective performance can be inadvertent as well as intentional, and the duty can be imposed by the court as well as by a promise stated in the agreement. *Id.* at 722.

This Court has also ruled that a breach of contract is a failure to perform all or any part of what is warranted or required in a contract. *City of Bismarck v. Mariner Construction, Inc.*, 2006 ND 108, ¶13, 714 N.W.2d 484. Taking advantage of the mistake of a party to a contract is a violation of good faith and fair dealing. See generally, *Diocese of Bismarck Trust v. Ramada, Inc.*, 553 N.W.2d 760 (N.D. 1996).

In *Tallackson Potato Co., Inc., v. MTK Potato Co.*, 278 N.W.2d 417, 424 (N.D. 1979), this Court held that, in accordance with the Second Restatement of Contracts, frustration of a contract occurs when, after a contract is made, a party's principal purpose is substantially frustrated without his fault by occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made. In *Dunlap v. State*

Farm Fire & Cas. Co., 878 A.2d 434, 442 (Del. Supr. 2005), the court held that an implied covenant of good faith requires “a party in a contractual relationship to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits” of the bargain. Thus, parties are liable for breaching the covenant when their contract frustrates the “over arching purpose” of the contract by taking advantage of their position to control implementation of the agreement’s terms. *Id.* The Delaware court noted “the occasional necessity” of implying contract terms to ensure the parties’ “reasonable expectations” are fulfilled. *Id.*

WFND should not be punished by a “line by line” straight-jacket, four corners approach to breach of contract because it tried to simplify the case by not mixing contract and tort theories and because it specifically avoided falling into the trap of pursuing a tort remedy, where a breach of contract remedy was sufficient. The Purchase Agreement, taken as a whole, had one overriding purpose, the complete and accurate disclosure of the rent the tenants were actually obligated to pay under their leases. Fargo Marc had an actual contractual obligation and an implied obligation to accurately disclose the rent. Fargo Marc breached this fundamental purpose and object of the contract, by its deceit. WFND had no duty to discover the deceit and the court should have imposed a duty on Fargo Marc to accurately disclose rent, which duty Fargo Marc breached by its deceit. Taken as a whole, the Purchase Agreement and all of the documents it required, warranted the actual rent the tenants were contractually obligated to pay. This Court ruled in Mariner Construction, Inc., *supra*, the failure of a warranty amounts to a breach of contract. The principal purpose of the Purchase Agreement was substantially frustrated without WFND’s fault because the basic assumption under which the Purchase

Agreement was made, truthful disclosure of tenant rent, did not occur. Tallackson Potato Co., Inc., supra.

B. The Damages For The Reduced Old Navy Rent Should Be Calculated Using An 8% Capitalization Rate, Not 9.08%.

The court correctly found that the appropriate measure of damages suffered by WFND because of the reduced Old Navy rent of \$22,135 per year should be calculated by dividing that sum by the appropriate capitalization rate. The only expert testimony about an appropriate capitalization rate came from the preeminent James Kirby, who testified that the appropriate capitalization rate for an Old Navy rent reduction would be 8% (Tr. PP. 364, 367 and 368).

Fargo Marc's expert offered no testimony on damages. Nevertheless, the court applied a 9.08% capitalization rate resulting in damages of \$243,777.53 (See Finding #68, App. P. 507).

The 9.08% capitalization rate came from ¶14.1 on page 2 of the Amended Purchase Agreement (App. P. 207), which was only designed to reduce the purchase price if Fargo Marc placed unspecified future tenants paying rent less than \$14 per square foot. But, any future tenants would not be of the same quality and creditworthiness of the anchor tenant, Old Navy, might have very short lease terms, might not be national tenants and thus reduced income from a lesser tenant is not as valuable as reduced rent from an A+ national long-term tenant such as Old Navy. Old Navy's lease has an original term of five years (App. PP. 78 and 79), with an option to extend for two additional five-year periods. (App. P. 81).

The court noted that the 9.08% figure was in the Amended Purchase Agreement to be used with future tenants. The court was also swayed by what it recalled of Mr.

Pachucki's testimony, that he thought it would be unfair to apply a lower capitalization rate (App. P. 478). Recall the counter intuitive concept that the lower the capitalization rate, the greater the damages.

Mr. Pachucki was not qualified to testify about proper capitalization rates, did not do so in connection with the rate to be applied to the deceitfully misrepresented Old Navy rent, and in fact, confirmed that generally capitalization rates have come down, thus suggesting that, given overall market conditions, an 8% interest rate might today be more appropriate to measure damages from a reduction in Old Navy rent.

WFND objected at the very first sign that Mr. Pachucki might offer expert testimony about industry practices and standards about appropriate capitalization rates, yield requirements and investment requirements. (Tr. P. 696). Although Mr. Pachucki testified that the [derived] capitalization rate of 9.08% might be odd because it ends in .08% (Tr. P. 698) and that he was surprised that Mr. Kirby applied an 8% capitalization rate to Old Navy because "Old Navy is not the anchor" (Tr. P. 699), he never produced expert or other testimony about the appropriate capitalization rate for the misrepresented Old Navy rent. He did testify that an 8% capitalization rate would be "more reflective of the market today, actually". (Tr. PP. 719 and 768).

Mr. Pachucki was an architect who had developed and sold a couple of shopping centers. This is not big time commercial real estate development.

As the preeminent Mr. Kirby testified:

"Well, I believe that, now this is just one of my pet peeves maybe, but, everybody's an expert [on] real estate it seems and because everybody knows something about it, has bought an [SIC] house, rented an apartment, but to do commercial development at a substantial scale, requires a set of skills and a set of knowledge that's way beyond the

ordinary and I often say that if somebody is a brain surgeon, if he says anything about any aspect of the human body, people listen respectfully, but if you're a real estate developer, everybody knows at least as much as you do, even though I am pretty sure there's more people that can do brain surgery than can do high end commercial development." (Tr. P. 296).

The court was reluctant to do anything that would smack of "kind of like putting a knife in and twisting it to use the higher rate" (App. P. 479), even though the higher rate came from uncontradicted expert testimony about the proper measure of damages, and apparently wanted to help someone who had deceitfully misrepresented rent. Recall also that Mr. Pachucki was impeached at least three times during the trial, first by saying that Old Navy was at least a co-anchor tenant of Westgate Commons, later changing his mind and stating that he had no monetary relationship with Robert Miller, or problems with the Lincolnwood Shopping Center, only to be shown later that he had a listing agreement which paid Mr. Miller \$75,000, (App. PP. 464-466) and severe parking and zoning problems at the Lincolnwood Center, proved especially by the April 4, 2003 letter (App. PP. 467 and 468) which, in discussing zoning problems at the Lincolnwood Center, refers to "the Seller's representations and warranties set forth in the Agreement to be materially and adversely untrue." and "the Seller's breach of its representations and warranties".

Applying an 8% capitalization rate to the misrepresented Old Navy rent income of \$22,135 per year yields damages of \$276,687, the sum originally sought by WFND (App. P. 522, Item #1).

C. WFND Should Recover All Damages From The Reduced Old Navy Rent Without Application Of The Comparative Fault Statutes.

Although the court expressed a strong preference to have the case presented under contract law, it insisted on receiving evidence on both contract and tort theories. In the

end, the court, after adopting erroneous views of the law and misinterpreting and misapplying the law of contract, felt that it was “just forced” (App. P. 488) to analyze the case in tort. The court did indicate that it is “a very close question” and almost invited an appeal (App. PP. 488 and 489).

Except where a plaintiff itself mixes contract and tort theories or fails to elect a breach of contract remedy, we find no North Dakota case that applies the comparative fault statutes, to a breach of contract/commercial case. An un-annotated copy of Chapter 32-03.2, N.D.C.C., appears at the end of this brief.

N.D.C.C. §32-03.2-01 defines fault to include acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to tort liability or dram shop liability. The term also includes strict liability for product defect, breach of warranty, negligence or assumption of risk, misuse of a product for which the defendant otherwise would be liable, and the failure to exercise reasonable care to avoid an injury or to mitigate damages.

We ordered all of the legislative history to the comparative fault statutes from the Legislative Counsel, and could have added a fourth volume to the Appendix by adding the legislative history there.

We located nothing in the legislative history to even hint that it was meant to do anything other than curb personal injury, negligence and product liability litigation, as part of “tort reform” sweeping the country at the time.

This Court has already cautioned counsel not to make cases more complex and confusing than necessary by trying to mix principles of tort and contract law. *Dakota Grain Co. v. Ehrmantrout*, 502 N.W.2d at 236 (N.D. 1993). This is exactly what WFND

tried to do by carefully electing the remedy of breach of contract well in advance of the trial (finding #26, App. P. 498). *Case Credit Corp. v. Oppegards, Inc.*, 2005 ND 141, shows what befalls a plaintiff who elects to proceed in tort, where it could have recovered the same damages using a non-tort theory.

We find no North Dakota case that applies the comparative fault statutes where a plaintiff has elected to prove breach of contract. All North Dakota cases we have reviewed applying the comparative fault statutes have addressed cases where the plaintiff itself mixed contract and tort theories, made the tactical mistake of proceeding under tort, where a breach of contract recovery was available, or where the underlying dispute involved negligence, personal injury, wrongful death or a tort, such as conversion.

D. Fargo Marc Is Entitled To No Damages Because Of WFND's Land Sale.

Fargo Marc's claim must depend on ¶19.15 of the Purchase Agreement (App. P. 194), read together with ¶19.2 (App. P. 192) and ¶13.1 (App. P. 187).

The last sentence of ¶19.15 allows a split of sale proceeds only "for such conveyance". This refers back to the first part of ¶19.15 which contains two conditions precedent. There must have been prior written approval from WFND, and the sale must have occurred before the closing. A condition precedent is one which must be performed before performance is due and may be a prerequisite to the existence of a contract. *Airport Inn Enterprises, Inc. v. Ramage*, 2004 ND 92, ¶11, 679 N.W.2d 269.

Mr. Pachucki, already found to be deceitful and "fundamentally forgetful", recalled some type of oral agreement to the contrary made after the November 19, 2002 Purchase Agreement. However, the January 6, 2003 Amended Purchase Agreement (App. PP. 206-210), mentions no delayed sales to Menards, and nothing in it modifies

¶19.15 of the Purchase Agreement. This could not possibly have been left out of the January 6, 2003 Amended Purchase Agreement, because Mr. Pachucki was trying to conclude his sale, for only \$25,000, to Menards because of an agreement signed by Menards on December 26, 2002 and by Mr. Pachucki himself on January 8, 2003 (App. PP. 263-273).

N.D.C.C. §9-06-07. Written contract supersedes oral negotiations. The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument.

N.D.C.C. §9-09-06. Alteration of written contract. A contract in writing may be altered by a contract in writing or by an executed oral agreement and not otherwise. An oral agreement is executed within the meaning of this section whenever the party performing has incurred a detriment which he was not obligated by the original contract to incur.

N.D.C.C. §9-06-04. Contract invalid unless in writing – Statute of frauds. The following contracts are invalid, unless the same or some note or memorandum thereof is in writing and subscribed by the party to be charged, or by his agent:

3. An agreement . . . for the sale, of real property, or of an interest therein.

The modification of a written contract by a parole agreement must be clear and satisfactory. *Buttz v. Colton*, 43 N.W. 717, 721 (Dakota Terr. 1889)(emphasis added). In sales involving real estate, a written contract cannot be modified by an unexecuted oral agreement although the modification pertains only to the performance of the contract. *Cugham v. Larson*, 100 N.W. 1088, 1089 (N.D. 1904). A written agreement may be abrogated by a subsequent oral agreement fully executed. *Fletcher v. Nelson*, 69 N.W. 53, 57 (N.D. 1896). The statute of frauds has no application to an executed contract. *Bunting v. Creglow*, 168 N.W. 727, 728 (N.D. 1918). A written contract cannot be altered by an unexecuted parole agreement, but the parties to a written contract may enter

into a new parol agreement, separate and distinct from the old contract, unless such an agreement is required to be in writing. Quinlivan v. Dennstedt Land Co., 168 N.W. 51, 52 (N.D. 1918). To satisfy the Statute of Frauds in the sale of land, a writing is required. Smith v. International Paper Co., 87 F. 3d 245, 247 (8th Cir. 1996)(determining that contracts required to be written under the Statute of frauds may not be modified orally). See also Warrenton Campus Shopping Ctr., Inc. v. Adolphus, 787 S.W.2d 852, 855 (Mo. App. 1990).

Mr. DiMucci, who would know, testified that the land he eventually sold to Menards months after the closing was almost twice as much land Mr. Pachucki tried to sell.

After the closing, Mr. Pachucki did nothing to facilitate a sale to Menards and did nothing to track Mr. DiMucci's efforts. It was not until after Mr. Pachucki learned from Menards that some sale had occurred, that he allegedly started to make a claim. He offered no testimony that he had been back to Fargo to see what had been sold.

So here is someone found by the court to be "fundamentally forgetful" and "deceitful" who was thoroughly impeached at the trial who claims he had a subsequent oral agreement to share a land sale, only to forget about the sale and the oral agreement, until months later. Mr. Pachucki's claims are barred by the parole evidence rule, the Statute of Frauds, lack of consideration, the Purchase Agreement and Amended Purchase Agreement, his failure to prove, let alone know, what was ultimately sold, and his own lack of credibility.

At most, even if this Court believes Mr. Pachucki and agrees that he has some right to share the sale proceeds, he would only be entitled to share the \$25,000 he admitted was the best sale he could have made before the closing.

E. WFND Is Entitled To Interest On Its Damages, Is The Prevailing Party And Is Entitled To Attorneys' Fees Under North Dakota Law And The Purchase Agreement.

In the Amended Complaint, WFND sought 6% interest on all of its damages from and after January 30, 2003 (App. P. 14). The amounts were calculated for the court and included in the summary of damages (App. PP. 522 and 523, Items 2, 4, 6, 8 and 9). Although the court twice promised to address interest in its oral ruling (App. PP. 482 and 492), it never did in its findings (App. PP. 493-516), or its August 2, 2005 e-mail (App. P. 470).

Rule 52(a) N.D.R.Civ.P., requires the court to make findings of fact when a case has been tried without a jury.

In *Hurst v. Hurst*, 295 N.W.2d 316, 323 (N.D. 1980) this Court held that where the court ruled on an issue but failed to make any findings, its determination was clearly erroneous and had to be set aside.

At the trial, WFND cited §47-14-05, N.D.C.C. (Tr. P. 1184) which provides, in pertinent part, that “interest for any legal indebtedness must be at the rate of 6% per annum...”. This was the interest rate suggested for items two and four in the Summary of Damages Plaintiff Seeks (App. P. 522).

¶19.3 of the Purchase Agreement (App. P. 192) states:

... in the event either party hereto shall employ legal counsel to bring an action at law or other proceeding against the other party to enforce any of the terms, covenants or conditions hereof, the party substantially

prevailing in any such action or other proceeding shall be paid all reasonable attorneys' fees and costs, expert witness fees and costs, and other expenses related to such dispute incurred by the non-prevailing party ("Legal Fees"). In the event any judgment is secured by such substantially prevailing party, all such legal fees shall be included in such judgment

In *T.F. James Co. v. Vakoch*, 2001 ND 112, ¶6, 628 N.W.2d 298, this Court ruled that a written commercial lease is not "evidence of debt" within the meaning of N.D.C.C. §28-26-04 which prohibits enforcement of an attorneys' fee provision.

Just as a written commercial lease is not a note, bond, mortgage, security agreement or other evidence of debt, neither is the Purchase Agreement.

Even under the court's findings, WFND was the "substantially prevailing" party. It did recover \$243,777.53 because of the misrepresented Old Navy rent, albeit reduced by 30% through misapplication of the comparative fault statutes.

When the Old Navy damages are awarded using the proper capitalization rate (\$276,687), the comparative fault deduction is taken away, interest is properly considered and awarded, and Fargo Marc's recovery for WFND's post closing sale to Menards is taken away, WFND will clearly be the prevailing party.

F. For Fargo Marc To Benefit From Its Own Deceit Proves A Misinterpretation And Misapplication Of The Comparative Fault Statutes.

The court's straight-jacket, line by line, four corners, pigeon hole view of breach of contract would lead to many situations where there could not be a breach of contract, even where its essential purpose or object was frustrated.

Here, Fargo Marc obtained 30% of \$243,777.53 (already an improperly reduced amount) or \$73,133.26 because of its misrepresentation, "deceit" and "fundamental forgetfulness". Fargo Marc would have been worse off under the court's ruling, if it had

simply breached the Purchase Agreement. Instead, it benefits by its own misrepresentation, “deceit” and “fundamental forgetfulness”. This happens because of a stunted view of breach of contract and a misinterpretation of the comparative fault statutes. Courts must construe statutes to avoid ludicrous results and idle acts. *Frisk v. Frisk*, 2006 N.D. 165, ¶12, 719 N.W.2d 332.

VII. CONCLUSION AND PRECISE RELIEF SOUGHT

This was a very enjoyable case to try. Judge Herman was respectful and attentive at all times to the parties, all witnesses and the attorneys. The same was true of opposing counsel.

This Court has the opportunity to properly define breach of contract, properly interpret and confine the comparative fault statutes to their terms, legislative history and case law, and prevent unnecessarily complicated cases.

The proper measure of damages for the deceitfully misrepresented Old Navy rent should be calculated using an 8% capitalization rate yielding a recovery for WFND of \$276,687, to which should be added 6% interest through August 30, 2006 of \$42,886.49, along with accruing interest after August 30, 2006, all without any reduction because of the comparative fault statutes.

WFND is entitled to all of the other interest items identified in the summary of damages submitted to the Court (App. PP. 522 and 523), along with Items 3, 5 and 7 from that summary, stipulated to and already awarded by the Court (App. P. 515). Fargo Marc should receive nothing from WFND’s sale to Menards.

Thus, subtracted from the agreed construction holdback of \$345,633.18 should be the total sum of \$520,965.11 resulting in a judgment in favor of WFND against Fargo

Marc for \$175,331.93, plus interest after August 30, 2006 all as outlined in the summary of damages (App. PP. 522 and 523). In addition, the Court should remand the issue of attorneys' fees with instructions that the court determine and award attorneys' fees to WFND as the prevailing party under the Purchase Agreement.

Dated this 26th day of September 2006.



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CHAPTER 32-03.2
COMPARATIVE FAULT, DAMAGES, COLLATERAL SOURCE PAYMENTS AND
PERIODIC PAYMENTS

32-03.2-01. Definition. As used in this chapter, "fault" includes acts or omissions that are in any measure negligent or reckless towards the person or property of the actor or others, or that subject a person to tort liability or dram shop liability. The term also includes strict liability for product defect, breach of warranty, negligence or assumption of risk, misuse of a product for which the defendant otherwise would be liable, and failure to exercise reasonable care to avoid an injury or to mitigate damages. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault.

32-03.2-02. Modified comparative fault. Contributory fault does not bar recovery in an action by any person to recover damages for death or injury to person or property unless the fault was as great as the combined fault of all other persons who contribute to the injury, but any damages allowed must be diminished in proportion to the amount of contributing fault attributable to the person recovering. The court may, and when requested by any party, shall direct the jury to find separate special verdicts determining the amount of damages and the percentage of fault attributable to each person, whether or not a party, who contributed to the injury. The court shall then reduce the amount of such damages in proportion to the amount of fault attributable to the person recovering. When two or more parties are found to have contributed to the injury, the liability of each party is several only, and is not joint, and each party is liable only for the amount of damages attributable to the percentage of fault of that party, except that any persons who act in concert in committing a tortious act or aid or encourage the act, or ratifies or adopts the act for their benefit, are jointly liable for all damages attributable to their combined percentage of fault. Under this section, fault includes negligence, malpractice, absolute liability, dram shop liability, failure to warn, reckless or willful conduct, assumption of risk, misuse of product, failure to avoid injury, and product liability, including product liability involving negligence or strict liability or breach of warranty for product defect.

32-03.2-02.1. Automobile accident damage liability. Notwithstanding section 32-03.2-02, in an action by any person to recover direct and indirect damages for injury to property, the damages may not be diminished in proportion to the amount of contributing fault attributable to the person recovering, or otherwise, if:

1. The person seeking damages is seeking property damages resulting from a motor vehicle accident in which two persons are at fault;
2. The person seeking damages is seeking to recover direct physical property damages of not more than five thousand dollars and indirect physical property damages not to exceed one thousand dollars; and
3. The percentage of fault of the person against whom recovery is sought is over fifty percent.

This section applies regardless as to whether the person seeking direct and indirect damages for injury to property also seeks damages for personal injury, however, damages for personal injury are not available under this section.

32-03.2-03. Pure comparative fault - Product liability actions. Repealed by S.L. 1993, ch. 324, § 5.

32-03.2-04. Economic and noneconomic damages for wrongful death or injury to person. In any civil action for damages for wrongful death or injury to a person and whether arising out of breach of contract or tort, damages may be awarded by the trier of fact as follows:

1. Compensation for economic damages, which are damages arising from medical expenses and medical care, rehabilitation services, custodial care, loss of earnings

and earning capacity, loss of income or support, burial costs, cost of substitute domestic services, loss of employment or business or employment opportunities and other monetary losses.

2. Compensation for noneconomic damages, which are damages arising from pain, suffering, inconvenience, physical impairment, disfigurement, mental anguish, emotional distress, fear of injury, loss or illness, loss of society and companionship, loss of consortium, injury to reputation, humiliation, and other nonpecuniary damage.

32-03.2-05. Separate finding on damages. In awarding compensation for damages to any party, the trier of fact shall make separate findings which must specify:

1. The amount of compensation for past economic damages.
2. The amount of compensation for future economic damages.
3. The amount of compensation for noneconomic damages.

32-03.2-06. Reduction for collateral source payments. After an award of economic damages, the party responsible for the payment thereof is entitled to and may apply to the court for a reduction of the economic damages to the extent that the economic losses presented to the trier of fact are covered by payment from a collateral source. A "collateral source" payment is any sum from any other source paid or to be paid to cover an economic loss which need not be repaid by the party recovering economic damages, but does not include life insurance, other death or retirement benefits, or any insurance or benefit purchased by the party recovering economic damages.

32-03.2-07. Pleading of damages. Any pleading for damages for death or injury to a person may pray for economic and noneconomic damages separately. Any prayer for noneconomic damages of less than fifty thousand dollars or for economic damages may be for a specific dollar amount. Any prayer for noneconomic damages for fifty thousand dollars or more must be stated generally as "a reasonable sum but not less than fifty thousand dollars".

32-03.2-08. Review of reasonableness of economic damages. In addition to any other remedy provided by law and after a jury award of economic damages, any party responsible for the payment of any part thereof may request a review of the reasonableness of the award by the court as follows:

1. Awards in excess of two hundred fifty thousand dollars before reduction for contributory fault and collateral source payments are subject to review for reasonableness under this chapter.
2. The burden is on the moving party to establish that the amount of economic damage awarded was not reasonable in that it does not bear a reasonable relation to the economic damage incurred and to be incurred as proven by the party recovering the award.
3. If the court finds that the jury award of economic damages is unreasonable, the court shall reduce the award to reasonable economic damages.

32-03.2-09. Periodic payments for continuing custodial care. If an injured party claims future economic damages for continuing institutional or custodial care that will be required for a period of more than two years, at the discretion of the court any party may request the trier of fact to make a special finding of the total amount awarded for this care, separate from other future economic damages, and if a separate award is made, any party may make periodic payments for this care in an amount approved by the court, provided payment of the total award for this care is adequately secured. The adequacy of the periodic payments within the limit of the total award will be subject to review by the court from time to time, and upon the death of the injured person the obligation to provide for further continuing care shall terminate.

32-03.2-10. Nondisclosure of reduction for collateral source payments. The jury may not be informed of the potential for the reduction of economic damages because of payments from collateral sources.

32-03.2-11. When court or jury may give exemplary damages.

1. In any action for the breach of an obligation not arising from contract, when the defendant has been guilty by clear and convincing evidence of oppression, fraud, or actual malice, the court or jury, in addition to the actual damages, may give damages for the sake of example and by way of punishing the defendant. Upon commencement of the action, the complaint may not seek exemplary damages. After filing the suit, a party may make a motion to amend the pleadings to claim exemplary damages. The motion must allege an applicable legal basis for awarding exemplary damages and must be accompanied by one or more affidavits or deposition testimony showing the factual basis for the claim. The party opposing the motion may respond with affidavit or deposition testimony. If the court finds, after considering all submitted evidence, that there is sufficient evidence to support a finding by the trier of fact that a preponderance of the evidence proves oppression, fraud, or actual malice, the court shall grant the moving party permission to amend the pleadings to claim exemplary damages. For purposes of tolling the statute of limitations, pleadings amended under this section relate back to the time the action was commenced.
2. If either party so elects, the trier of fact shall first determine whether compensatory damages are to be awarded before addressing any issues related to exemplary damages. Evidence relevant only to the claim for exemplary damages is not admissible in the proceeding on liability for compensatory damages. If an award of compensatory damages has been made, the trier of fact shall determine whether exemplary damages are to be awarded.
3. Evidence of a defendant's financial condition or net worth is not admissible in the proceeding on exemplary damages.
4. If the trier of fact determines that exemplary damages are to be awarded, the amount of exemplary damages may not exceed two times the amount of compensatory damages or two hundred fifty thousand dollars, whichever is greater; provided, however, that no award of exemplary damages may be made if the claimant is not entitled to compensatory damages. In a jury trial, the jury may not be informed of the limit on damages contained in this subsection. Any jury award in excess of this limit must be reduced by the court.
5. In order for a party to recover exemplary damages, the finder of fact shall find by clear and convincing evidence that the amount of exemplary damages awarded is consistent with the following principles and factors:
 - a. Whether there is a reasonable relationship between the exemplary damage award claimed and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred;
 - b. The degree of reprehensibility of the defendant's conduct and the duration of that conduct; and
 - c. Any of the following factors as to which evidence is presented:
 - (1) The defendant's awareness of and any concealment of the conduct;
 - (2) The profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; and

- (3) Criminal sanctions imposed on the defendant for the same conduct that is the basis for the exemplary damage claim, these to be taken into account if offered in mitigation of the exemplary damage award.
6. Exemplary damages may not be awarded against a manufacturer or seller if the product's manufacture, design, formulation, inspection, testing, packaging, labeling, and warning complied with:
 - a. Federal statutes existing at the time the product was produced;
 - b. Administrative regulations existing at the time the product was produced that were adopted by an agency of the federal government which had responsibility to regulate the safety of the product or to establish safety standards for the product pursuant to a federal statute; or
 - c. Premarket approval or certification by an agency of the federal government.
7. The defense in subsection 6 does not apply if the plaintiff proves by clear and convincing evidence that the product manufacturer or product seller:
 - a. Knowingly and in violation of applicable agency regulations withheld or misrepresented information required to be submitted to the agency, which information was material and relevant to the harm in question; or
 - b. Made an illegal payment to an official of the federal agency for the purpose of securing approval of the product.
8. Exemplary damages may be awarded against a principal because of an act by an agent only if at least one of the following is proved by clear and convincing evidence to be true:
 - a. The principal or a managerial agent authorized the doing and manner of the act;
 - b. The agent was unfit and the principal or a managerial agent was reckless in employing or retaining the agent;
 - c. The agent was employed in a managerial capacity and was acting in the scope of employment; or
 - d. The principal or managerial agent ratified or approved the doing and manner of the act.
9. In a civil action involving a motor vehicle accident resulting in bodily injury, it is sufficient for the trier of fact to consider an award of exemplary damages against the driver under the motion procedures provided in subsection 1 if clear and convincing evidence indicates that the accident was caused by a driver who, within the five years immediately preceding the accident has been convicted for violation of section 39-08-01 and who was operating or in physical control of a motor vehicle:
 - a. With an alcohol concentration of at least ten one-hundredths of one percent by weight;
 - b. Under the influence of a controlled substance unless a drug that predominantly caused impairment was used only as directed or cautioned by a practitioner who legally prescribed or dispensed the drug to the driver;
 - c. Under the influence of alcohol and refused to take a test required under chapter 39-20; or

d. Under the influence of a volatile chemical as listed in section 19-03.1-22.1.

At the trial in an action in which the trier of fact will consider an award of exemplary damages, evidence that the driver has been convicted of violating section 39-08-01 or an equivalent statute or ordinance is admissible into evidence.

32-03.2-12. Posttrial review. Motions for periodic payments, reductions of awards for contributory fault and collateral source payments, for review of the reasonableness of an award, and for setting the amount of exemplary damages, must be made to the judge who presided over the trial of the action, unless the judge is unable to act, in which case, the motion must be presented to a judge designated by the presiding judge of the district in which the trial was held. The motion must be made within ten days of the jury verdict, or order of the court, and if so made, judgment may not be entered until the motion has been ruled on.

CERTIFICATE OF COMPLIANCE

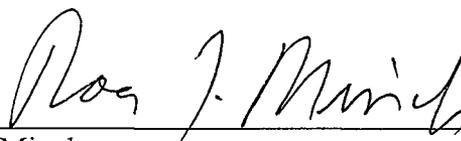
The undersigned, as attorney for the Appellant in this matter, and as the author of the above brief, hereby certifies, in compliance with Rule 32(a)(7) of the North Dakota Rules of Appellant Procedure, that the Brief of Appellant contains 13,325 words, from the portion of the Brief entitled "I. Statement of Issues" through the date line above the signature line on the last page of the Brief.

The undersigned is grateful for the indulgence the Court has granted, both with an extension of the time to file the Brief and the September 15, 2006 letter which granted the Appellant leave to file a brief with 13,500 words.

The word count is done by the computer which also counts abbreviations as words.

The undersigned, in keeping with the Court's admonition in its September 15, 2006, letter, has made every effort to avoid repetition, and condensed the Brief as far as possible without omitting critical facts or material.

Dated this 26th day of September 2006.



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